

Valuing labour: The interaction of law and informal norms in UK agriculture

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Abstract

The relationship between labour law and informal norms in the governance of working relationships is underexplored terrain. While notable exceptions exist, they have thus far tended to focus on the prioritisation of informal norms either in the absence or at the expense of labour law. This article contributes to the debate by empirically examining the interaction and associated impact of norms and law in one UK-based sector, agriculture.

Drawing on qualitative interviews with farming employers and workers, informal norms are compared to three statutory laws on wage-related benefits – pensions, apprenticeship rates and accommodation. In each of these cases, the informal norm appeared to offer more potential protection to the workers than the legislative provision. The reason for this lies in the different constructions of ‘value’ in the law and the informal norm.

I. Introduction

Working relationships are regulated by the interaction of legal and non-legal norms and yet the two have often been treated as distinct in the scholarship of different disciplines.² While socio-legal, pluralist and regulatory studies of law have begun to investigate the links between law and

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² Andrew Frazer, ‘Labour law, institutionalist regulation and the employing organization’ (2014) 201(1) *International Employment Relations Review* 4, 9.

informal norms, often they focus on the effectiveness of law; its acceptability, contingency and legitimacy in the world it seeks to regulate.³ Particular institutionalist accounts⁴ have sought to reconceptualise the relationship between law and norms, recognising that law is affected by embedded organisational norms. However, it is the law in these studies which often provides the dominant frame of analysis: how norms affect legal compliance or are invoked in law's absence. Far less is known about how law and informal norms interact within working relationships⁵ and the subsequent impact on workers when norms are either successfully displaced by law or not. This paper thus addresses these research questions through empirical examination of the interplay between informal norms and three statutory, wage-related laws in one UK-based sector: agriculture. It finds that the interplay is nuanced, with law's displacement of norms not necessarily leading to better worker protection.

Described as 'an interesting enigma',⁶ agriculture is a traditionalist industry guided by its own internal principles and rules. Externally, 'a number of factors differentiate farming employment relations from the remainder of the economy',⁷ not least the seasonality and perishability of the produce and a tight supply chain which controls farm operations. Indeed, until 2013, the UK had a separate regime of enhanced employment law rights for agricultural workers in recognition of

³ *Ibid* 10.

⁴ E.g. Richard W Scott, 'Crafting an Analytic Framework I: Three Pillars of Institutions' in *Institutions and Organizations* (2013, Sage Publishing); Frazer (n 2) 16.

⁵ Petra Mahy, Richard Mitchell, Sean Cooney and John Howe, 'The Plural Regulation of Work: A pilot study of restaurant workers in Yogyakarta, Indonesia' (Centre for Employment and Labour Relations Law, 2017) 15 <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/2475259/Plural-Regulation-of-Work-Pilot-Study-of-Restaurant-Workers-Yogyakarta-ISBN-9780734053916-online.pdf> accessed 9 April 2019.

⁶ Jane L. Glover and Trish Reay, 'Sustaining the Family Business with Minimal Financial Rewards: How do family farms continue?' (2015) 28(2) *Family Business Review* 163, 163.

⁷ Rupert Tipples, 'The further re-regulation of farming employment relations in New Zealand' (2007) 47(1) *Sociologia Ruralis* 63, 67.

the uniqueness of the sector.⁸ This was abolished in England in 2013,⁹ leaving those employed after 31 October 2013 within the generic legislative framework. Internally, the involvement of family members and emotional attachment to the farm complicate rationality within the decision-making process, not least as farming is often ‘viewed as a lifestyle, or a way of life.’¹⁰ As a result, I anticipated that working relationships within the sector would be regulated by several informal norms which would likely resist law’s formalised system.

I focus on three wage-related statutory provisions, namely pensions, accommodation and apprentice pay, to allow deeper consideration of law’s connection to informal norms. As they are prescriptive provisions, the legal rules contain little discretion regarding their application. As such, compliance with the law is binary, leaving scope for considering whether deviant behaviour is actually compliance with an informal norm. In addition, these laws govern areas of norm behaviour which have recently changed, allowing reflection on the impact for workers when law displaces norms. In doing so, my approach builds on the recent empirical turn in labour law,¹¹ which explores ‘how the law is used: not simply whether it achieves its objectives (however defined) but how people come to accommodate and live with it’.¹²

⁸ Agricultural Wages Act 1948; Agricultural Wages (England and Wales) Order 2012.

⁹ By the Enterprise and Regulatory Reform Act 2013 s.73 and Schedule 20. Wales has retained the regime: Agricultural Wages (Wales) Order 2019.

¹⁰ Linda Price and Nick Evans, ‘From ‘As Good as Gold to ‘Gold Diggers’: Farming Women and the Survival of British Family Farming’ (2006) 46(4) *Sociologia Ruralis* 280, 283; Mieke Calus and Guido Van Huylenbroeck, ‘The Persistence of Family Farming: A Review of Explanatory Socio-economic and Historical Factors’ (2010) 41(5) *Journal of Comparative Family Studies* 639.

¹¹ Amy Ludlow and Alysia Blackham (eds.) *New frontiers in empirical labour law research* (Hart Publishing, Oxford, 2015); Jeremias Prassl, *The Concept of the Employer* (Oxford University Press, Oxford, 2015); Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, Oxford, 2015); Lydia Hayes, *Stories of Care: A Labour of Law* (Palgrave MacMillan Publishing, 2017).

¹² Linda Dickens and Mark Hall, ‘Review into research into the impact of employment relations legislation’ (Employment Relations Research Series No 45, DTI, 2005) 32.

This article is set out in four parts. I begin by reviewing the literature on the relationship between law and informal norms drawn from the law-and-economics movement, socio-legal literature on compliance and empirical studies on the operation of informal norms in UK working relationships. I then introduce the research background and design before presenting my empirical findings in three sections which focus on norm construction; norms as additional benefits; norms as aligned to other industry norms; and norms as being more protective than law. Each section discusses the interplay between informal norms and law before concluding that the norm appears to be preferred by relevant actors to the law because of its increased protection and the value it affords to labour.

II. The relationship between law and norms

Workplaces are ‘a hotbed for norm-bedded action’.¹³ Ranging from understanding the impact of gender norms, recognising a workers’ code of honour or assessing a disinclination to discuss wages,¹⁴ research has established a multiplicity of norms which operate alongside formal structures and rules within organisations. Interest in the interplay between law and norms boomed in the mid-1990s when scholars of the law-and-economics movement embraced a new wave of norm scholarship.¹⁵ The movement recognised that ‘a law is an obligation backed by a state sanction... a norm can be defined as an obligation backed by a nonlegal sanction.’¹⁶ Those non-legal sanctions

¹³ Jon Elster, ‘Social Norm and Economic Theory’ (1989) 3 *Journal of Economic Perspectives* 99, 101.

¹⁴ Leonard Bierman and Rafael Gely, ‘Love, Sex and Politics - Sure - Salary - No Way: Workplace Social Norms and the Law’ (2004) 25(1) *Berkeley Journal of Employment & Labour Law* 167, 175.

¹⁵ Robert C. Ellickson, ‘The Evolution of Social Norms: A perspective from the legal Academy’ in Michael Hechter, Karl-Dieter Opp (ed.) *Social Norms* (Russell Sage Foundation, 2001) 35.

¹⁶ Robert Cooter, ‘Do Good Laws Make Good Citizens: An Economic Analysis of Internalized Norms’ (2000) 86 *Virginia Law Review* 1577, 1579-80.

can include a variety of social punishments, from ostracism to gossip.¹⁷ As a result, where law cannot provide enough sanctions or incentives to encourage behaviour towards a perceived public good, norms may provide the constructive role in encouraging behaviour.¹⁸

Rational choice theory is often utilised by law-and-economics scholars, who view behaviour as motivated rationally and by self-interest,¹⁹ such that decisions are taken on an implicit cost-benefit analysis. Thus, one of the movement's most well-known proponents, Eric Posner, considers the horizontal interplay between law and behaviour to be 'signalling equilibria',²⁰ in which individuals comply with laws to seek reputational gain or protection. In his case of tax compliance, most people would not voluntarily pay tax under the traditional rational wealth maximiser position because it does not serve their financial interests;²¹ consequently tax is supported by penalties for evasion. However, Posner argued that when penalties are too high, compliance can be undermined as it removes the ability to voluntarily honour tax obligations and thus reduces the chance to 'signal' a willingness to establish cooperative relationships.²² A social norm is therefore a label and, Posner claims, 'has no independent explanatory power.'²³ Norms may therefore be managed by lawmakers to encourage preferential behaviour, with social meaning created and sustained by

¹⁷ Ellickson (n 15) 35-6.

¹⁸ Dan M. Kahan, 'Signaling or Reciprocating - A Response to Eric Posner's Law and Social Norms' (2002) 36 *University of Richmond Law Review* 367, 367-8.

¹⁹ Sally S. Simpson and Melissa Rorie, 'Motivating Compliance: Economic and Material Motives for Compliance' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing [online] 2011) 60.

²⁰ Eric A. Posner, 'Law and Social Norms: The Case of Tax Compliance' (2000) 86 *Virginia Law Review* 1781, 1819.

²¹ Kahan (n 18) 376-377.

²² *Ibid* 378.

²³ Posner (n 20) 1819.

law.²⁴ While Posner's theory is a sophisticated analysis which explains repeated behaviour beyond the profit maximisation model, his conceptualisation fails to adequately explain empirical behaviour, or as Kahan argues, it is behaviourally unrealistic.²⁵ One of Posner's core problems, as for other rational choice theorists, is his attempt to model such a broad spectrum of behaviour that nearly any phenomenon can be negated or accounted for.²⁶ In addition, Posner's theory fails to recognise the complexity within the interplay between law and norms, not least through his denial of norms' causative effects. As a result, the relationship between norms and law can be understood as being more unpredictable than Posner suggests.

A. The preference of norms over law

Much of the early work on the relationship between law and norms focused on the role of norms at the expense of law.²⁷ For instance, Stewart Macaulay's classic study into US businessmen and lawyers found that contract law was routinely ignored in business transactions.²⁸ Instead, informal norms exerted more of an influence on behaviour than legal regulation. Likewise, in Lisa Bernstein's research into the American merchant trade, two types of informal norms were preferred to laws to manage relationships: relationship-preserving ('RPNs') and 'end of game' norms ('EGNs'). RPNs included dispute-resolution and performance-based norms and focused on upholding the relationship between actors, whilst EGNs were chosen at the end of the relationship

²⁴ Emanuela Carbonara, 'Law and Social Norms' in Francesco Parisi (ed.) *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts* (Oxford University Press, 2017) 473.

²⁵ Kahan (n 18) 375, 385.

²⁶ *Ibid* 371-372.

²⁷ Bierman and Gely (n 14) 173-174.

²⁸ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55, 63.

and were included in the legal contract.²⁹ Preference for RPNs centred on the need for flexibility. Thus, RPNs were ‘deliberately allocated to the extralegal realm’³⁰ because they relied on observable but not verifiable information, or the cost of formalising the obligation was too high. RPNs also reflected adjustments to which parties did not want to be bound or which were made solely to preserve a profitable relationship. Social sanctions were also often more effective than legal sanctions.³¹ Transactors thus implicitly distinguished between these norms, choosing the one most appropriate for their contracting stage and relationship;³² the law was not the *a priori* guiding force.

Other, more recent empirical research, has noted the continuing role that norms play within working relationships, particularly in smaller, or family-run firms, where rules are often unwritten and principles tacitly understood.³³ Jordan *et al*’s study into employers’ perceptions of labour legislation noted that amongst small firms, ‘the norm was to operate “like a family”, which was at odds with developing formal practices.’³⁴ Instead, practices were characterised by the daily routines between employees and managers,³⁵ with formal rights flexibly interpreted to meet the

²⁹ Lisa Bernstein, ‘Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms’ (1996) 144 *University of Pennsylvania Law Review* 1765, 1796-7.

³⁰ *Ibid* 1797.

³¹ *Ibid* 1798.

³² *Ibid* 1797-8.

³³ Monder Ram, Paul Edwards, Mark Gilman and James Arrowsmith, ‘The Dynamics of Informality: Employment Relations in Small Firms and the Effects of Regulatory Change’ (2001) 15(4) *Work, Employment & Society* 845, 846; James Arrowsmith, Mark W. Gilman, Paul Edwards and Monder Ram, ‘The Impact of the National Minimum Wage in Small Firms’ (2003) 41(3) *British Journal of Industrial Relations* 435, 438-9, 451-2.

³⁴ Elizabeth Jordan, Andrew Thomas, John Kitching, Robert A. Blackburn, *Employment Regulation. Part A: Employer Perceptions and the Impact of Employment Regulation* (Business, Innovation & Skills, Employment Relations Research Series No. 123, March 2013) 34; Brigitte Kroon and Jaap Paauwe, ‘Structuration of precarious employment in economically constrained firms: the case of Dutch agriculture’ (2014) (1) *Human Resources Management Journal* 19, 32.

³⁵ Kroon and Paauwe (n 34) 32.

business context.³⁶ As a result, informal norms retain a crucial importance in working relationships, often at the expense of law.

B. The role of norms when law is weak

The relationship between informal norms and law has also been considered by socio-legal scholars when analysing compliance. While the formal construct of compliance compares the formal definition of legal obligations to the actual behaviour of the regulated,³⁷ socio-legal literature has suggested that, alternatively, compliance should be considered as ‘the negotiated outcome of the regulatory encounter’,³⁸ or as ‘a process of extended and endless negotiation’.³⁹ Consequently, failure to comply with law may actually signal compliance with a sub-culture’s norms.⁴⁰ As a result, the relationship between norms and law is dynamic, and ‘informal norms and institutions often play complementary or even substitutive roles when formal regulation is absent or ignored’.⁴¹

One of the leading theorists on this topic, Lauren B. Edelman, examines the role of employment law when law is ambiguous, procedural in its emphasis or has weak enforcement mechanisms.⁴² In her view, the issue is weakness within the legal regime, which allows law to be constructed ‘in

³⁶ Dickens and Hall (n 12) 350.

³⁷ Bettina Lange, ‘Compliance Construction in the Context of Environmental Regulation’ (1999) 8(4) *Social & Legal Studies* 549, 552.

³⁸ Robyn Fairman and Charlotte Yapp, ‘Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement’ (2005) 27(4) *Law & Policy* 491, 491, 495.

³⁹ Peter K. Manning, ‘Reviewed Work(s): To Punish or Persuade: Enforcement of Coal Mine Safety by John Braithwaite’ (1988) 28(4) *The British Journal of Criminology* 559, 561.

⁴⁰ Lange (n 37) 564.

⁴¹ Petra Mahy, ‘The functional approach in comparative socio-legal research: reflections based on a study of plural work regulation in Australia and Indonesia’ (2016) *International Journal of Law in Context* 420, 421.

⁴² Lauren B. Edelman, ‘Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law’ (1992) 97(6) *American Journal of Sociology* 1531, 1532.

a manner that is minimally disruptive to the status quo'.⁴³ Her theory of legal endogeneity highlights that the creation of formal structures can appear as visible mechanisms for implementing legal rules, which can often serve as merely a symbolic commitment to legislative compliance.⁴⁴ Indeed, she finds that the symbolic value of commitment to law motivated organisations 'even in the absence of any rational motivation for doing so'.⁴⁵ Crucially, those conceptualisations – imbued with meaning from organisational norms and institutionalised by courts' interpretations – become entrenched within the law's legitimacy.⁴⁶ Conflict between norms and laws are thus balanced, with external legitimacy provided by these gestures of compliance, mediated by individual managerial discretion.⁴⁷

Fundamental to Edelman's discussion is the role of the ambiguity of law and legal processes, providing the space within which norms can be prioritised over law within the operation of the law itself. Employment law does 'tend to set forth broad and ambiguous principles that give organizations wide latitude to construct the meaning of compliance'.⁴⁸ However other rules, such as the statutory wage-related benefits under discussion here are far more prescriptive. There is thus scope for further inquiry into the interplay between norms and these statutory rules.

⁴³ *Ibid* 1535.

⁴⁴ *Ibid* 1544.

⁴⁵ *Ibid* 1545.

⁴⁶ *Ibid* 1546-1547.

⁴⁷ *Ibid* 1567.

⁴⁸ *Ibid* 1532.

C. The role of norms when new law is introduced

Law can sometimes displace informal norms; however legal rules which are substantially different to a prevailing norm require gradual introduction to allow adaptation.⁴⁹ If not, or when the legal rules pursue different objectives to the norm, often the relationship breaks down, with the informal norm emerging the victor.⁵⁰ For example, when the UK's National Minimum Wage ('NMW') Act was introduced in 1998, it created a generally applicable statutory wage law.⁵¹ Its introduction thus brought a challenge to embedded informal norms regarding pay. Ram *et al* noted an initial regulatory 'shock' amongst employers when the law was first enacted, both as to costs and increased administrative requirements.⁵² However, this shock was not seen as significant enough 'to jolt employers or workers out of their customary practices and habits'.⁵³ This was because the shock was 'absorbed by informal understandings',⁵⁴ with wages influenced by product market pressures, labour force characteristics and labour market institutions, as well as internal customary norms.⁵⁵ According to Arrowsmith *et al*'s inquiry into the clothing, hotel and catering industries, the most common response to the NMW was to simply absorb the increase in costs.⁵⁶ Employers also claimed that workers had requested lower wages to ensure they still received social security

⁴⁹ Carbonara (n 24) 479.

⁵⁰ *Ibid*.

⁵¹ Agriculture had its own statutory minimum wage: Agricultural Wages Act 1948 and associated Orders.

⁵² Ram *et al*. (n 32) 847.

⁵³ *Ibid* 847; Arrowsmith *et al*. (n 33) 451.

⁵⁴ *Ibid* 852; *Ibid* 452.

⁵⁵ *Ibid* 858-9; *Ibid* 452; Monder Ram, Paul Edwards and Trevor Jones, 'Staying Underground Informal Work, Small Firms, and Employment Regulation in the United Kingdom' (2007) 34(3) *Work and Occupations* 318, 336; Damien Grimshaw and Marilyn Carroll, 'Adjusting to the national minimum wage: constraints and incentives to change in six low-paying sectors' (2006) 37(1) *Industrial Relations Journal* 22; Janet Druker, Geoffrey White and Celia Stanworth, 'Coping with Wage Regulation: Implementing the National Minimum Wage in Hairdressing Businesses' (2005) 23(1) *International Small Business Journal* 5.

⁵⁶ Arrowsmith *et al* (n 33) 451; Ram *et al* (n 33) 847.

benefits.⁵⁷ Interestingly, the workers interviewed by Arrowsmith *et al* varied on whether they viewed this was acceptable, depending on the fairness of pay, how they were treated and the relative pressure of the job. Other employers responded to NMW as a ‘critical event’, where implementation triggered changes to working practices which had been under consideration. As such, the law’s introduction, whilst resulting in organisational change, was moulded by the informal norms of the workplace. The researchers concluded that ‘legal obligations will be ignored if they do not relate to the established set of informal norms.’⁵⁸ Thus it is not only the quality of the law that may affect the relationship; the entrenchment of the norm itself is likely to be relevant.

This brief review of the literature highlights that authors such as Bernstein have determined that norms are often preferred to law within working relationships, whilst theorists such as Posner and Edelman have sought to explain this interaction by reference to the law’s perceived inadequacy. In the next section, I build on this literature by demonstrating that the picture is more complicated when one examines the impact of the interaction between law and norms on working relationships in an agricultural setting. In doing so, I challenge the implicit assumption within existing scholarship that following norms over law tends to be detrimental to workers, by suggesting that labour is valued more highly under prevailing normative standards than the current legislative framework.

⁵⁷ *Ibid* 443.

⁵⁸ Ram *et al* (n 33) 367.

III. Background and methodology

A. UK Agriculture

Data was collected as part of a wider project on how UK-based small-sized livestock farmers responded to employment law. The project was set against a backdrop of significant uncertainty for the agricultural industry driven by a declining labour availability and increasing financial pressures, issues which frame this research.

Since 2000 there has been a notable decline in regular, full-time hired labour in UK small farms, with a comparative increase in seasonal labour.⁵⁹ However, the demand for workers is anticipated to rise over the next few years.⁶⁰ Farmers are thus increasingly concerned about a sectoral labour shortage, a shortage which is exacerbated due to the declining availability of migrant workers following the Brexit referendum in 2016.⁶¹ Of all the agricultural workforce, migrant workers have received the most attention by researchers.⁶² This is unsurprising; agriculture has ‘high levels of seasonal, informal and migrant labour’,⁶³ as the seasonal nature of the work positively lends itself

⁵⁹ Michael Winter and Matt Lobley, *Is there a future for the small family farm in the UK? Report to The Prince's Countryside Fund* (Prince's Countryside Fund 2016) 47; Michel Blanc, Eric Cahuzac, Bernard Elyakime and Gabriel Tahar, ‘Demand for on-farm permanent hired labour on family holdings’ (2008) 35(4) *European Review of Agricultural Economics* 493, 494.

⁶⁰ Caroline Nye, ‘The ‘blind spot’ of agricultural research: Labour flexibility, composition and worker availability in the South West of England.’ (2018) 27(3) *Cahiers Agricultures* 35002.

⁶¹ Environment, Food & Rural Affairs Committee, *Feeding the nation: labour constraints (Seventh Report)* (HC 2016-17, HC1009, April 2017) 3.

⁶² See, for example: Precision Prospecting, ‘Temporary Workers in UK agriculture and horticulture: A Study of Employment Practices in the Agriculture and Horticulture Industry and Co-Located Packhouse and Primary Food Processing Sectors’ (Precision Prospecting Ltd and University of Cambridge 2005); Ben Rogaly, ‘Intensification of Workplace Regimes in British Horticulture: The Role of Migrant Workers’ (2008) 14 *Population, Space and Place* 497.

⁶³ Sonia McKay, Steve Jefferys, Anna Paraksevopoulou and Janoj Keles, *Study on precarious work and social rights* (Working Lives Research Institute, European Commission, April 2012) Appendix A:3; Bridget Anderson and Ben Rogaly, ‘Forced Labour and Migration to the UK’ (Centre for Migration, Policy and Society in collaboration with the Trades Union Congress 2005) 26.

to such a workforce.⁶⁴ Taking account of this literature, this project does not analyse migrant workers as a distinct group, because its aim is to bridge a gap in understanding working relationships more broadly. There is also not the same differentiation of status between migrant and domestic workers on livestock farms; workers are treated similarly because animals need the same daily care year-round.

In addition, financial pressures and declining margins have resulted in mass intensification in agricultural production, where priority is given to quality, volume and price.⁶⁵ The UK Government's cheap food policy has encouraged growth of the industry, promoting large-scale farm practices.⁶⁶ Retailers have sought further intensified practices which demand more work for less pay,⁶⁷ making it difficult for suppliers to pay living wages,⁶⁸ whilst last-minute changes to orders and ever-shorter lead times increase pressures.⁶⁹ These practices impact upon the entrepreneurial control of employers, and pose significant challenges to smaller farmers who may lack the resources to meet the demands. Indeed, Lobley *et al* spoke of an 'agricultural treadmill', where farmers have 'to 'run' constantly to survive and 'stand still'.⁷⁰ Consequently, this research focused on smaller farms to explore the impact of these pressures, particularly as in smaller

⁶⁴ Precision Prospecting (n 62) 31-2; David McCollum and Allan Findlay, *Trends in A8 migration to the UK during the recession* (2011) (Population Trends 145, Office for National Statistics, Autumn 2011); Andrew Geddes and Sam Scott, 'UK Food Businesses' Reliance on Low-Wage Migrant Labour: A Case of Choice or Constraint' in Martin Ruhs and Bridget Anderson (eds), *Who needs migrant workers? Labour shortages, immigration and public policy* (Oxford Scholarship Online, 2012).

⁶⁵ Rogaly (n 62) 500; Precision Prospecting (n 62) 42.

⁶⁶ Winter and Lobley (n 59) 4.

⁶⁷ Rogaly (n 62) 497.

⁶⁸ Ethical Trading Initiative, 'Company purchasing practices' (Ethical Trading Initiative) <<http://www.ethicaltrade.org/issues/company-purchasing-practices>> accessed 20 November 2018.

⁶⁹ Precision Prospecting (n 61) 33.

⁷⁰ Matt Lobley, Michael Winter and Rebecca Wheeler, *The Changing World of Farming in Brexit UK* (Routledge Publishing 2018) 57.

businesses, relationships are usually more heavily embedded with informal norms.⁷¹ Classifying a farm as small, however, is not without its practical difficulties.⁷² As a result, farms were considered ‘small’ when they self-identified as such; which meant owner-occupied or tenanted farms, not agribusinesses or large land owners.

B. Research design

I conducted semi-structured face-to-face interviews with 29 farmers/farm managers and 2 workers at 26 farms/farm estates, to generate rich data in a flexible format.⁷³ The qualitative approach enabled a conversational style, which encouraged reflections on how participants viewed their world. Employers were the primary focus of this study to examine how they responded to employment law, in light of the industry’s pressures. Participants were predominantly recruited from the South West of England, through utilising personal contacts in the farming community and adopting a snowballing sampling method. Participants were primarily male, with five female, reflecting the wider trend that most farmers are male, albeit this sample had more women farmers than the 11% national average.⁷⁴ Seven were aged between 30-39; five between 40-49; twelve between 50-59 and the remaining seven were over 60, again reflecting the wider demographic of the sector, where 25% of farms are staffed by over 55-year olds.⁷⁵ All interviews were recorded and transcribed, with some selectively transcribed due to their length (3 hours+). Ethics approval

⁷¹ Monder Ram, Paul Edwards, Trevor Jones, Maria Villares-Varela, ‘From the informal economy to the meaning of informality: Developing theory on firms and their workers’ (2017) 37(7/8) *International Journal of Sociology and Social Policy* 361, 367; Ram et. al. (n 32) 846; Ram et al. (n 54) 322.

⁷² Winter and Lobley (n 58) 10.

⁷³ Mats Alvesson, *Interpreting Interviews* (Sage Publications, London, 2011) 2.

⁷⁴ Calculated from: Richard Clegg, ‘EMP04: Employment by Occupation’ (Office of National Statistics, 11 September 2018).

⁷⁵ Tom Blenkinsop, HC Deb 24 April 2013, vol 561 col 926.

was granted for this research prior to data collection and pseudonyms are used throughout to protect participants' identities.

Finally, identifying norms was a complicated task.⁷⁶ While norms' external aspects can be revealed empirically through tangible, observable behaviour,⁷⁷ they may clash with internal norms as to what actors think ought to be done.⁷⁸ Following the pattern-seeking approach adopted by Mahy *et al*,⁷⁹ practices were considered an informal norm when they were expected or considered standard enough to be sufficiently replicated over interviews. Moreover, norms could be identified reflexively by the participants through a comparison between their own behaviour and the wider industry. The extracts presented here thus reflect the wider opinion inherent in the sample.

IV. The norms

In this section, I use extracts from interviews with farm owners and estate managers, to extend the literature in two important ways. First, I highlight the continuing role norms play in managing agricultural working relationships, which often appears more protective of workers than the legal provisions which seek to displace them. Secondly, I suggest that the reason for this difference lies in the respective constructions of 'value' entailed in legal and normative frameworks.

A. Norm as an additional benefit

⁷⁶ Mahy *et al* (n 5) 32.

⁷⁷ Reza Banakar, Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity (Springer, 2015) 216; Mahy (n 41) 428.

⁷⁸ Mahy *et al* (n 5) 32.

⁷⁹ Ibid.

In agriculture many workers, including seasonal staff, live in accommodation tied to their jobs.⁸⁰ The law allows employers to deduct up to £7.55/day from pay as an offset against the national minimum/living wage ('NM/LW').⁸¹ This statutory maximum was intended to protect employees from excessive charges levied by employers.⁸² However, not one employer in this sample deducted an offset. Instead where accommodation was provided as part of the job, the norm was to provide it, and bills and council tax, free of charge, as shown by Paul:

The lowest paid is Paula, she's 20, she's on 20 grand, um, and then you've got Phil on 22, Paddy on 23 and Peter on 28. Included in that is a free house, so they pay nothing for their house, council tax, electricity.

(Paul, dairy farm owner, aged 30-39)

Paul provided housing to each of his workers including his migrant worker (Peter) and recently hired worker (Phil). The norm was constructed as an additional benefit to staff, irrespective of legal regulation or the worker's position. As a result, the market rate was regarded by these farmers as forming part of the reward package for employment, with Sam highlighting the practical costs:

When we gave him a house, I effectively gave him nearly a £7000 pay rise, y'know – I could get £7000 of rent on that property.

(Sam, livestockfarm owner, aged 50-59)

⁸⁰ Department for Environment, Food & Rural Affairs, 'Consultation on the Future of the Agricultural Wages Board for England and Wales, and Agricultural Wages Committees and Agricultural Dwelling House Advisory Committees in England: Summary of Responses (Department for Environment, Food & Rural Affairs, December 2012, revised February 2013) 7.

⁸¹ National Minimum Wage Regulations 2015 regs 9 and 16.

⁸² Department for Business Innovation & Skills, 'Low Pay Commission consultation on the accommodation offset' (Low Pay Commission and Department for Business, Innovation & Skills, 25 July 2012) <<https://www.gov.uk/government/news/low-pay-commission-consultation-on-the-accommodation-offset>> accessed 9 April 2019.

By providing accommodation as part of the financial package, its value was constructed differently to the legal rule providing for deduction of an off-set. Consequently, some workers appeared in a better financial position under this norm than had the law been followed. Other farmers did not provide accommodation, but increased the wages to reflect the costs of living in their area:

A house 'round here to rent out is worth anywhere from 750 to 1200 pound a month, if you took that much money plus the council tax off an employee's wages, they basically wouldn't work for you.., if you paid them 30 odd grand a year, they'd go find their own house to live in. (Rob, dairy farm owner, aged 50-59)

As in Ram *et al.*,⁸³ the law was ignored in preference of an established set of informal norms which viewed accommodation as part of workers' financial package. Whilst not a legal obligation - the statutory offset only sets a maximum deduction – the norm is also not displaced. This is despite declining financial margins where, using a rational choice approach, it might be considered that providing accommodation leaves little benefit to employing farmers.

One reason for this seems to be the declining availability of staff, as Rob said: *'so many farmers think the only way they'll get an employee is to offer a house.'* In many ways, this reflects Posner's signalling theory, where in the context of a sectoral labour shortage, employers are signalling willingness to contract through providing housing. Furthermore as the norm provides a more protective dispensation to workers in valuing accommodation as a non-deductible benefit, the law is not necessarily needed to encourage social welfare.⁸⁴ However, the norm of providing a house for free not only signals but has created an entrenched expectation amongst future workers. As

⁸³ Ram *et al.* (n 33) 367.

⁸⁴ Carbonara (n 24) 473.

Rob continued, '*farming's dug its own hole on this one by offering accommodation*'. Thus, contrary to Posner, the norm is a causative factor which continues to substantiate itself within the industry. It seems that in current structural conditions, the norm is too entrenched to be displaced by law and yet that appears positive for the workers concerned.

The norm to provide accommodation also extended into providing it to long-term workers past their retirement, with additional financial support coming from the State pension:

The presumption was that you get a house for life, which is a completely bizarre, concept in.... So, Terry's father was in a house for life and I would imagine that there would be an expectation from Terry [Tom's worker] that he would have one as well.

(Tom, farm estate manager, aged 50-59)

This norm operated to reflect the longevity of the relationship, with workers and their families remaining in the property, which had been attached to their job, until their death. However, there were outstanding issues to address, such as responsibility for repairs, as the following extract with Zak shows:

Interviewer: When he retires, will he lose the house?

Zak: No, that is his house.... he'll have to pay market rent when he retires, but he can live there all the time and I think his wife can as well. So, we had this, we had another house in the village down the road and... they lived in the house for 30 years and the real problem was, we got to the point where we, the tenant left and no work had been done in the house, because there's no, well, there's no reason why you would look after that house! [laughs] but then we got to the end of it and we had to spend, 40 grand on repairs. So it was a bit of an eye-opener thinking

well actually we should look after these estate staff, houses a bit better really. So yeah Zeke [Zak's worker] will, he's grown up and had all his children in that house, he'll live there for, forever I think. (Zak, farm estate manager, aged 30-39)

This extract raises several points, not least that Zeke will be required to pay rent at a market rate and thus the relationship will transfer from an employment relationship to one of landlord and tenant on retirement. However, the rationale for this appeared to stem from Zak's previous experience with a long-term tenant, who outlived expectations and consequently the property fell into disrepair. Importantly, however, there is recognition of Zeke's emotional connection to the house which Zak prioritises as his intention to keep him *in situ* and continue the relationship, presumably for the benefit of the worker. As such, the norm developed into incorporating mutual responsibilities, for the worker to pay rent and the house to be kept in good condition. Crucially, the phrase deployed was '*looking after*'; reflecting a sense of value in the relationship which echoes Bernstein's relationship-preserving norms.⁸⁵ This research, however, extends Bernstein's analysis by applying it to a relationship that changed. While the relationship was preserved, it was reframed, suggesting that RPNs relate to the individuals as well as the contractual context. Thus, Zak appeared to deliberately allocate a RPN to flexibly manage the new relationship, altering the terms in line with his perceptions of future profitability. In return, Zeke appears protected by retaining his home. The norm thus provided an additional benefit for both parties, valued beyond the legal contractual construction.

⁸⁵ Bernstein (n 29) 1796-7.

B. Norms' displacement by new law

Since 2017, pensions must be offered as a matter of law, and this legislative change has begun displacing the house for life norm. All jobholders over 22 who earn over £10,000 per year are to be automatically enrolled into an employer's pension scheme, although opt-outs (and -ins) are available.⁸⁶ Employers' duties have been staggered since 1 October 2012,⁸⁷ and the 2017 review into its implementation concluded that 'automatic enrolment was working', as it 'harnesses inertia' by ensuring individuals are defaulted into the scheme.⁸⁸ Opt-out rates were generally 9%, although this was higher at 10% and 12% for micro- and small businesses respectively.⁸⁹ Exploratory research suggested that opt-outs may increase due to a lack of information on the scheme and a perceived lack of affordability, particularly for women.⁹⁰ Targeted self-employment interventions were due to be tested, and potentially legislated for, in 2018 however this has not yet happened.⁹¹

This new legal requirement interacts with the traditional norm of providing a house for life. As Tom pointed out, this may be a '*bizarre*' concept, but it may also explain why 65% of agricultural workers had not enrolled in a pension by the end of 2017;⁹² the underlying embedded formal norm continued to affect compliance with the pension law. Yet there has been some alteration to expected practices, for instance:

⁸⁶ Pensions Act 2008 ss.3, 7, 8.

⁸⁷ Employers' Duties (Implementation) Regulations 2010 reg. 4.

⁸⁸ Department for Work & Pensions, *Automatic Enrolment Review 2017: Maintaining the Momentum* (Cm 9546, December 2017) 13.

⁸⁹ *Ibid* 29.

⁹⁰ Rajiv Prabhakar, 'Why do people opt-out or not opt-out of automatic enrolment? A focus group study of automatic enrolment into a workplace pension in the United Kingdom' (2017) 27(5) *Journal of European Social Policy* 447.

⁹¹ Department for Work & Pensions (n 87) 16.

⁹² Trade Union Congress, 'Six in ten workers in hospitality and agriculture not paying into a pension' (9 October 2017) < <https://www.tuc.org.uk/news/tuc-reveals-pension-blackspots> > accessed 4th April 2019.

I sort of said to them “Look you can take it but we’re not going to pay it to you if you don’t take it, it’s something we’re being legally obliged to do, I wouldn’t do it if we, I didn’t have to.” But y’know it’s only fair that they obviously have a pension... (Paul)

The law’s challenge to the norm has been accepted by some farmers, which seems more deliberate than the absorption of the rules reported when the NMW was introduced.⁹³ As the rules were staggered, it may be that farmers could adapt to the pension provisions rendering displacement of the norm more likely.⁹⁴ However, more pertinent is Paul’s use of the word ‘fair’. Several of the research participants recognised that the introduction of pensions meant alignment of agricultural employment with other industries. As such, agriculture’s informal norms were both displaced by the law and aligned with other industries. That shift enabled farmers to more readily accept the legal change as opposed to reduce it to a question of sanctioned legal compliance, again invoking farmers’ internal value of staff:

I’m quite happy with it [pension enrolment] ... I’m hopefully quite conscious that people do need to be looked after. (John, dairy farm owner, aged 30-39)

Thus, in a related extension to Ram *et al*⁹⁵, as there was greater alignment of the law to the employer’s embedded practices and view of fairness, legal obligations were more readily accepted. However not all farmers valued pensions as an acceptable norm with some, such as David,

⁹³ Ram *et al*, (n 33) 858-9; Arrowsmith *et al* (n 32) 452; Ram *et al* (n 55) 336; Damien Grimshaw and Marilyn Carroll, ‘Adjusting to the national minimum wage: constraints and incentives to change in six low-paying sectors’ (2006) 37(1) *Industrial Relations Journal* 22; Janet Druker, Geoffrey White and Celia Stanworth, ‘Coping with Wage Regulation: Implementing the National Minimum Wage in Hairdressing Businesses’ (2005) 23(1) *International Small Business Journal* 5.

⁹⁴ Carbonara (n 24) 479.

⁹⁵ Ram *et al*. (n 33) 367.

encouraging workers to opt-out:

I'm just going to get her to sign herself out of it.

(David, dairy farm owner, aged 40-49)

The reasons for this were two-fold. First, was '*the extra cost basically...they still want their top whack [wage] per hour and they want that on top.*' Pensions add around 8% to the wage bill, however it was the staff's expectation of a higher salary that David appeared concerned with. The second reason concerned how he constructed his social identity as an employer, and his perceived relationship with the law and Government: '*Why should we be... doing the State's job of looking after folk?*' Accordingly, for David, the law will not displace his informal norm as the valuation of labour does not align.

While there is clearly potential for workers to be disadvantaged in this situation, David's worker had requested a reduction in hours because '*she only wants to earn £8,000 a year and doesn't want to pay tax!*' Likewise, as employees also contributed, some farmers reported their staff had requested the opt-out, particularly younger employees:

To them, it just looks like you're robbing money off them, going in their pension:

"Well actually I wanted it that weekend coz I'm going out!!"

(Yohan, dairy farm owner, aged 30-39)

The supposed variation from the law in this manner does not render displacement of the norm ineffective. Importantly the regulations allow for variation within legal behaviour, where deviance is legitimised through the inclusion of the opt-out. Thus, extending Edelman, there was a weakness in the law which allows compliant behaviour, even though the law was still successful in changing

behaviour. Therefore, as agriculture moves away from giving farmworkers ‘a house for life’, if opt-outs increase, many workers – particularly older workers – will be in a more precarious position than they were prior to these changes. Of course, with the decline in both permanent staff and potential housing stock, this practice may well have declined naturally in the future. However, the embedded norm, compared to the statutory provision, seems to leave many workers more protected.

C. The norm as more protective than the law

The final legal provision to be discussed concerns apprenticeship pay. Apprenticeships are paid employment in a skilled occupation, which incorporates an element of substantial training for a minimum of 12 months.⁹⁶ In 2015, the programme underwent a package of reforms to be more employer-led, to make apprenticeships more attractive and ‘a credible alternative to both higher education and jobs without training’.⁹⁷ As part of this reform, the UK Government increased the rate by 21%, considerably more than the Low Pay Commission’s recommendation of a 2.6% increase.⁹⁸ While the Government recognised concerns over non-compliance with rates, and the potential increases deterring employers’ from engaging with the scheme, it felt that this ‘largest ever increase’ would improve the quality of the programme and applicants.⁹⁹ The 2019 rate is £3.90 and applies to those under 19 years of age, or in their first year; those over 19 and in their second year are entitled to their age-graded national minimum wage.

⁹⁶ HM Government, *The Future of Apprenticeships in England: Implementation Plan* (Department for Business, Innovation and Skills, BIS/13/1175 October 2013) 8.

⁹⁷ Department for Business, Innovation and Skills, *Regulations Implementing the National Minimum Wage – a Report on the Apprentice Rate* (Cm 9061, June 2015) 9.

⁹⁸ *Ibid* 6.

⁹⁹ *Ibid* 10.

In the research sample, however, the interplay between law and the informal norm led to unintended consequences due to differing valuations of labour. Farmers reported an intention to pay more than this statutory rate:

His figure for college is £3.50 an hour, ok, on that apprenticeship. So, we found that a bit, bit – seemed a bit mean really, y’know, £3.50? I mean, there’s not a lot of people that aren’t worth 5 quid... We were going to give him £5, but then one of the lecturers said to us at the college ‘we’d rather you stuck at 3.50.’

(Mark, estate farm manager, aged 40-49)

Mark explained that the college wanted parity across their students to deter comparisons, and arguments, at college. He was subsequently investing in his apprentice by sending him on training courses. Similarly, Xander’s young worker was hoping to attend an apprentice course, so the intended wage was reduced to the statutory level:

I don’t want to pay him more then cut when he goes as an apprentice [laughs] so I’m paying him his apprentice rate now, and if he gets taken on the course then that will be all well and good.

(Xander, dairy farm owner, aged 50-59)

Consequently, the legal standard is lower than the informal norm and has led to the worker being financially worse off. The apprentice rate is also not considered in isolation; it is intended to be, and appears considered by these employers, as the stepping stone to an ongoing working relationship:

We don’t view it as cheap labour – we view it as training somebody for the industry.

(Neil, dairy farm manager, aged 50-59)

However, due to the increases in other minimum wage rates, there is a large gap between apprentice rates and other minimum wages. As Mark commented;

He's on 3.50, and he needs to be on 8.10... I'm thinking yeah, he's suddenly 130% more, so is he worth that?

Mark thus questions his construction of labour's value compared to the legislative standard. To reconcile the division, Mark intended to offer a 12-month contract after the apprenticeship to enable flexibility on both sides, although he admitted '*it's more safeguarding us than him, really.*' The informal norm to pay more than the statutory rate – for example, the £5 per hour that Mark, and others, suggested – would bridge the gap between rates but also seemingly provide more secure employment after the apprenticeship ends.

The apprenticeship pay system is prescriptive, requiring a set pay rate with little ambiguity, and yet Edelman's theorising also holds true as compliance was undertaken symbolically.¹⁰⁰ While formally the pay rules were met, farmers presented different opportunities in line with their sense of fairness. The informal norms thus continued to regulate the relationship. In addition, the concerns articulated by Mark undermine the standard of worker protection provided by the law, as farmers begin questioning their investments against the higher rates of NM/LW after the apprenticeship ends. As a result, the conflict between law and norms are reconciled¹⁰¹ by compliance with formal pay rates but balanced by insecure contracts. It thus appears that the law, while legitimised, places workers in a more precarious financial position.

¹⁰⁰ Edelman (n 42) 1544.

¹⁰¹ *Ibid* 1567.

Discussion and conclusion

Discussions of informal norms and law tend to assume that the informal norm is a negative gloss to the law's positive intention. As previous studies have shown, informal norms can fill the space that law leaves behind – either in its absence or because it is ignored – or shape law, particularly upon its introduction. In these instances, the implicit assumption is that compliance with norms over law is a negative occurrence. However in this research, the informal norm provided potential benefits for workers, over the legislative standard.

Examining the statutory provisions on accommodation, pensions and apprenticeship pay revealed subtle interactions between the web of law and informal norms in working relationships. In this sample, norms were considered as an additional benefit, acceptable when aligned to other norms and more protective than the law. In each example, workers were seemingly financially more secure under the farmers' informal valuation of their labour than the statutory level. In some instances, such as providing accommodation free of charge, this simply reflects the rules as statutory minima, where employers can offer better terms. In others, even when the law was effective in displacing the norm as with apprentice pay, subsequent considerations undermined the law's protective capabilities. This impact of informal norms on the employment relationship thus requires further critical reflection, which focusing on the law as an analytical lens often fails to yield. Furthermore, this research queries the economic rational choice model as a basis for analysis as the actors it studied did not select options based solely on their own self-interest. While reduced staff availability may demand competitive wage-related benefits, decisions were still taken within the context of declining profits.

In the light of these findings, the interplay of informal norms and law within the employment relationship appears messy, or as Posner put it: ‘the effect of most laws on social behavior is so complex that a boundedly rational legislator could not predict it.’¹⁰² The task for this qualitative research has consequently not been one of prediction, but to question the often unidirectional gaze of scholarship that takes law as a positive analytic framework. Whilst the research discussed in this article is limited in its small-scale nature, and focused on employers, it does indicate that employers’ preference for norms can produce a beneficial outcome for workers. Consequently, while prediction is difficult, greater empirical understanding into the potential beneficial operation of informal norms prior to legislation’s enactment (even when legislating has been ‘successful’) could be a valuable policy endeavour.

¹⁰² Eric A. Posner, ‘Standards, Rules and Social Norms’ (1997) 21 *Harvard Journal of Law and Public Policy* 101, 112.

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